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| In the Matter of an Arbitration between<br><br>CITY OF MILWAUKEE<br><br>and<br><br>MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO | Grievance 14-90<br>Snow Callout |

Appearances:

Ms. Mary M. Rukavina, Attorney, Office of the City Attorney; representing the City.

Mr. Jeffrey P. Sweetland, Attorney, Podell, Ugent & Cross; representing the Union.

Before:

Mr. Neil M. Gundermann, Arbitrator.

ARBITRATION AWARD

The City of Milwaukee, Wisconsin, hereinafter referred to as the City, and Milwaukee District Council 48, AFSCME, AFL-CIO, hereinafter referred to as the Union, were unable to resolve a dispute. The parties selected the undersigned through the appointment procedures of the Wisconsin Employment Relations Commission to hear and determine the matter in dispute, and such hearing was held on June 10, 1991 at the Milwaukee City Hall. A transcript of the proceedings was taken and post-hearing briefs were exchanged through the arbitrator on February 29, 1992.

STIPULATED ISSUE:

Did the Bureau of Municipal Equipment violate the Memorandum of Agreement and the June 26, 1989 agreement on the snow removal call-out policy during a snow emergency declared on January 21,

1990, by calling fewer than all of the second-shift snow emergency crew to work, and failing to notify the Union that it was doing so? If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 6 MANAGEMENT RIGHTS

6.4 The City has the right to schedule and assign regular and overtime work as required.

ARTICLE 17 ARBITRATION PROCEDURE

17.11. The arbitrator shall neither add to, detract from, nor modify the language of this Agreement in arriving at a determination of any issue presented that is proper for arbitration within the limitations expressed herein. The arbitrator shall have no authority to grant wage increases or wage decreases.

ARTICLE 20 HOURS OF WORK

20.4 Nothing in this Agreement shall be construed as a guarantee or limitation of the number of hours to be worked per day, per week, or for any other period of time except as may be specifically provided.

ARTICLE 21 OVERTIME

21.5 The Department head or designee shall have the authority to schedule all overtime work to be performed consistent with the provisions of this Article. The City shall have the authority to reduce compensatory time balances.

ARTICLE 23 CALL-IN PAY

23.3 An employee who is required to work emergency overtime hours on a Sunday or a holiday at the direction of competent authority, and who is officially excused before completing three (3) hours of work shall be credited with three (3) hours of pay at time and three quarters (1.75); such credit shall be given in cash or compensatory time off in accordance with the OVERTIME Article of this Agreement.

BACKGROUND:

At the time of the hearing the parties were able to stipulate to the following facts: There was a snow storm in the City on

Sunday, January 21, 1990. The Bureau of Municipal Equipment responded with a full-scale plowing operation. There are 86 members of the collective bargaining unit on first shift, 25 of whom were on the call-out list. All 25 were called out on Sunday, January 21, 1990. There were 39 bargaining unit members on the second shift. All 39 members were on the call-out list, 9 of whom were called out on the 21st. The first shift worked from 4 a.m. until 4 p.m., Sunday, January 21, 1990. Those second-shift employes called out commenced work at 4 p.m., January 21, 1990 and worked until the end of their regular shift, which was midnight.

The Union filed a written grievance on January 23, 1990, challenging the call-out procedures employed by the City. Specifically, the Union claimed that the City violated the negotiated Snow Emergency Callout Policy by failing to call all 39 second-shift employes who were on the call-out list. Subsequently the Union contended that the City violated the Snow Emergency Callout Policy by not scheduling those called-out second-shift employes to work from 4 p.m. until 4 a.m. The Union asserts this was a violation of No. 6 of the Snow Emergency Call-out Policy.

The parties processed the grievance through the grievance procedure without resolution, and the matter was submitted to arbitration.

UNION'S POSITION:

The snow removal call-out policy has been the subject of a great deal of argument and confusion in past years. When there is a snow emergency, all personnel are expected to show, and if they do not, they are subject to reprimand. For many years, when there

was a snow emergency all persons on a call-out list would be called out. In fact, the present Union leaders cannot recall a time when there was a snow emergency and all the persons on the list were not called.

According to the Union, paragraph 8 of the Snow Emergency Callout Policy defines what occurs when the Union and management sit down at the beginning of the snow season and the City determines how many persons it will need at each location to meet the needs of the Department. The policy states that all appropriate personnel will be called based on their scheduled work shift. Management reserves the right to change or alter the work schedule if the situation warrants a different work schedule, but only with proper notification to the Union. The City concedes that no notice was given the Union about the decision to change the schedule or change the number and call only a part of the group on the second shift. The Union submits that this failure on the part of management violated the longstanding past practice of how the snow emergency agreement was understood by the parties.

The snow emergency agreement puts all employes on the call-in list on standby procedure. In this case, even though all 39 employes on the second shift were on standby because of the snow emergency, only a few were called; the others remained on standby without receiving a call. Even if the snowstorm was not as bad as originally thought, once a snow emergency was declared everyone should have been called in, paid call-in pay, and sent home if not needed. The City did not have the right to arbitrarily change the procedure that was agreed upon before the snow emergency.

By way of remedy, the Union requests that all second-shift employes who were not called in should receive the same pay as those who were called in and they should be made whole for this loss of pay and other benefits that they were denied.

CITY'S POSITION:

It is the City's position that the instant dispute involves the interpretation of clear language contained in the collective bargaining agreement. The Union claims that Article 23.3 of the agreement has been violated, and it is this violation that gives rise to the grievance.

Article 23.3 states:

> "An employee who is required to work emergency overtime hours on a Sunday or a holiday at the direction of competent authority, and who is officially excused before completing three (3) hours of work shall be credited with three (3) hours of pay at time and three-quarters (1.75); such credit shall be given in cash or compensatory time off in accordance with the OVERTIME Article of this Agreement. "

The City submits that nothing in the language of that contract provision suggests that the City is required to call in a predetermined number of employes in an emergency overtime situation. Indeed, the Union conceded as much during cross-examination of Union witness John Garland, President of Local 33. The Union suggests that the arbitrator should infer from the past practice as well as the snow emergency policy that the City must call in every second-shift employe on the snow call-out list in a snow emergency. The Union would then have the arbitrator apply this inference to the agreement to establish that a contract violation has occurred.

The City argues that by requiring the City to call in every second-shift employe in snow emergencies, and then requiring the City to pay those employes for standing by before being released to go home, the arbitrator would be imposing an unanticipated financial obligation upon the City which clearly must be left for contract negotiations between the parties.

Assuming, arguendo, that the arbitrator chooses to review both the alleged past practice as well as the June 26, 1989, Snow Emergency Callout Policy as aids in interpreting the agreement between the parties, it is the City's contention that they reinforce the City's position that it has the authority to control the scheduling and assignment of overtime.

Union witness Garland, testified that it was his understanding that in a snow emergency all employes on the second shift were to be called in. However, Frank Bock, Personnel Administrator for the Department of Public Works, testified that his understanding of the past practice does not include any requirement that all employes on the second shift who are on the call-out list must be called in by the City during a snow emergency. The City submits such conflicting views fly in the face of the requirements of a legitimate past practice--mutual understanding by the parties and of longstanding duration.

It is a well established labor relations principle that legitimate past practices are not always absolutely binding upon the parties. Even in cases where a practice is otherwise found to be binding, questions may arise as to its scope. In this respect the arbitrator must look at the underlying circumstances to

consider the true dimensions of the practice. In the instant case, it is clear that any past practice relative to the scheduling of and requirement to work overtime arose out of the context of Article 6.4 of the agreement.

The City contends that this "alleged practice" is a choice by management in the exercise of its discretion. Since the City has the absolute authority to control the assignment and scheduling of overtime, any choices that it makes with respect to exercising that discretion should not be thought of as an obligation or commitment for the future.

City witness Bock testified that during the last three or four years there has been a change in the process where the City had different kinds and levels of operation involving differing numbers of people called out. He testified there are at least four or five major types of operations, each of which might result in a different level of people needed in the garages to repair equipment. This issue was addressed in the snow emergency policy under item number 8. Paragraph 8 specifically states: "Management shall determine the number of persons to be called out."

Union witness Garland's recollection of the negotiation of the policy and the meaning of paragraph 8 differs significantly from that of Bock and Gary Jones, Assistant Superintendent for the Bureau of Municipal Equipment. However, Garland's interpretation of paragraph 8 of the Snow Emergency Callout Policy flies in the face of the clear language of the policy.

It is clear from the testimony of both the Union and the City that both parties were seeking clarification of snow emergency

call-out procedures and thus the Snow Emergency Callout Policy was drafted. Paragraphs 1 through 8 of the Snow Emergency Callout Policy are very specific with respect to the procedures to be followed in snow emergencies. If the parties felt that the number of employes to be called in was to be predetermined by the City, and this was important enough to specify, it would have been logical to write the requirement into the policy. Nothing was said of the need to require management to make this predetermination early on in the snow season. Union witness Garland failed to obtain such a requirement during negotiations over the snow emergency call-out policy. It is a well established principle that a party may not be granted through arbitration that which he failed to obtain through negotiations.

The language of the Snow Emergency Callout Policy is clear on its face. It dictates in paragraph 1 that snow duty employes must report when called out by bureau management during declared or undeclared snow emergencies. At paragraph 6 of the policy it dictates that under normal circumstances snow emergency shifts are 12 hours, from 4 a.m. to 4 p.m., or 4 p.m. to 4 a.m. Appropriate personnel will be called based on their scheduled work shift. And finally, at paragraph 8, the policy dictates that management shall determine the number of persons to be called out. Both Bock's and Jones' interpretations are consistent with each other as well as with the plain meaning of the language of the policy. Moreover, the language of the policy is consistent with the management rights clause articulated in Article 6.4, and the hours of work clause articulated at Article 20.4 of the agreement.

In support of its interpretation, the Union submits a prior grievance as evidence that the City negotiated the Snow Emergency Callout Policy as a way of resolving prior grievances filed by the Union, including the one submitted as Union Exhibit #1. In his testimony, Bock disputed this charge. Bock testified that the grievance introduced as Union Exhibit #1 did not deal with the number of employes called out, but rather it dealt with which employes were called out. Therefore, the grievance does not support the Union's position.

Based upon the foregoing, the City respectfully requests that the arbitrator deny the Union's grievance and dismiss its action in total.

DISCUSSION:

Section 6.4 of the agreement gives the City the right to schedule overtime work when it states: "The City has the right to schedule and assign regular and overtime work as required." The Union argues that the City's right to schedule overtime has been modified by the Snow Emergency Callout Policy.

Essentially, the Union argues that under that Policy the parties have agreed to the number of employes on each shift who will be called out to work overtime in the event of a declared snow emergency. The Union claims the City violated the Policy on January 21, 1990, when it failed to call out the entire second shift to work overtime on that date without informing the Union. The City claims it violated neither the collective bargaining agreement nor the Policy when it failed to call out the entire second shift on the 21st without notifying the Union.

It appears that the dispute in this case involves the interpretation and application of the Snow Emergency Callout Policy. Although the City argues that the collective bargaining agreement is controlling and therefore the undersigned should not give consideration to the Policy, the Policy represents an agreement between the parties regarding certain matters associated with call-outs for snow emergencies.

The first paragraph of the Policy states:

> "1. Snow duty employees must report when called out by bureau management during declared or undeclared snow emergencies. All full scale plowing operations are snow emergencies."

The significance of this provision is that the employes, presumably those employes on the call-out list, must report "when called out" by bureau management. This suggests that the employes do not automatically report for work but must wait until they are called.

If, as the Union contends, there was a past practice of calling out all employes on the call-out list when a snow emergency is declared the Snow Emergency Callout Policy does not reflect such practice. The City denies that such practice has existed, at least in the last few years when the level of response to a snow emergency has varied depending upon what work was being done. The fact that those employes called out must report suggests that some employes may not be called out. If the past practice has been to call out all of the employes on the call-out list and the parties intended to continue such practice the parties could have simply stated that in a snow emergency all employes on the call-out list will report to their assigned locations at the commencement of their respective shifts.

The next relevant provision of the Policy is paragraph 6, which states:

> "6. Under normal circumstances snow emergency shifts are twelve hours from 4 a.m. to 4 p.m. or 4 p.m. to 4 a.m. Appropriate personnel will be called based on their scheduled work shift. Employees should report to their assigned garage prior to the start of the shift so that employees are at their work station ready to begin working at the beginning of the shift. Management reserves the right to alter or change the preceding work schedule if the situation warrants a different work schedule in the course of the emergency with proper notification to the Union."

The language appears clear and unambiguous on its face. It provides that appropriate personnel will be called based on their scheduled work shift. The reference to "appropriate personnel" is to those employes who are called out.

The Union argues that the City's failure to notify the Union that all of the employes on the second shift call-out list would not be called violated the Policy. The undersigned is not persuaded that under paragraph 6 the City must advise the Union if it is not going to call out all of the employes on the call-out list. The only circumstances under which the City must notify the Union is where the work schedule for called-out employes is changed.

Paragraph 8 states: "Management shall determine the number of persons to be called out." This language is clear and unambiguous. When paragraph 8 is read in conjunction with paragraph 1, it becomes clear that there is nothing in the Policy which requires the City to call out all of the employes on the call-out list for each shift. Therefore, the fact that the City did not call out the entire second shift on January 21, 1990, did

not constitute a violation of the Policy or of the collective bargaining agreement.

Although the Union contends this provision refers to the initial determination made by the City regarding the number of employes who will be on the call-out list, the language contains no reference to the call-out list which is initially adopted by the parties prior to the snow season. Additionally, if paragraph 8 was intended to apply to the number of employes initially placed on the call-out list, the parties could simply have put the number of employes on the list for the two shifts in the Policy. The fact that the parties did not put that language in the Policy but elected to put the language contained in paragraph 8 in the Policy indicates that the City wanted to retain the right to determine the number of employes who would be called out at any given time, with the employes on the call-out list being the maximum number of employes that could be called out subject to the terms of the Snow Emergency Callout Policy.

Essentially, the Union argues that employes who may be required to work in the event of a snow emergency are required to make themselves available for work, and the quid pro quo for their being available is the City's obligation to call in the employes for at least the minimum amount of time provided under the call-in provisions contained in Section 23.3 of the agreement. The Union is really seeking a form of standby pay for employes who make themselves available in the event of a snow emergency. Neither the collective bargaining agreement nor the Policy provide for such compensation.

It therefore follows from the above facts and discussion thereon that the undersigned renders the following

AWARD

The City did not violate either the collective bargaining agreement or the Snow Emergency Callout Policy by not calling out the entire second shift on January 21, 1990 and not notifying the Union of its decision.

Neil M. Gundermann, Arbitrator

Dated this 25th day
of April, 1992 at
Madison, Wisconsin.